

II. Ethical Practices for Civil Litigation

Sara Anne Hook, M.B.A., J.D.

[N.B. All references to the Indiana Rules of Professional Conduct are taken from Indiana Rules of Court, **Rules of Professional Conduct**, *Including Amendments made through April 30th, 2015*, http://www.in.gov/judiciary/rules/prof_conduct/prof_conduct.pdf, accessed 5/13/16.)

A. Cooperation Among Attorneys

One of the underlying principles with the amendments to the Federal Rules of Civil Procedure (FRCP) back in December 2006 was to encourage cooperation among lawyers in the face of increasing amounts of evidence in digital formats, designated by the new terminology “electronically stored information” or ESI. One of the requirements under the revised FRCP was the concept of a “meet and confer” conference that would result in a discovery plan that would speed the timing of discovery, streamline the process and reduce costs as much as possible. In terms of the content of the conference, Rule 26(f)(2) Conference Content; Parties’ Responsibilities states that:

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. (Federal Rules of Civil Procedure, Legal Information Institute, https://www.law.cornell.edu/rules/frcp/rule_26, accessed 5/13/16.)

Rule 26(f)(3) provides guidance on what should be included in a discovery plan:

A discovery plan must state the parties’ views and proposals on:

- (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
- (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or

- focused on particular issues;
- (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
- (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;
- (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). (*Id.*)

Note especially the very short time period for all of this to happen, while Rule 26(f)(4) allows for an even more ambitious timeframe if allowed under local rules. What does this mean? Lawyers must cooperate.

In December 2015, the Federal Rules of Civil Procedure were revised again, with particular attention paid to proportionality and the opportunity for sanctions. However, FRCP is interesting in that it requires everyone, not just lawyers, to cooperate in the litigation process:

Rule 1: Requires *parties*, as well as courts, to construe, administer, and employ the Rules in a manner "to secure the just, speedy, and inexpensive determination of every action and proceeding." The Advisory Committee on Rules of Civil Procedure ("Committee") notes that: "Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure." (Randy Wu, Summary of December 2015 Amendments to the Federal Rules of Civil Procedure, Orrick, December 7, 2015, <https://www.orrick.com/Events-and-Publications/Pages/Summary-of-December-2015-Amendments-to-the-Federal-Rules-of-Civil-Procedure.aspx>, accessed 5/13/16.)

Other revisions should encourage cooperation between lawyers, including Rules 4(m), 16, 26(d)(2) and 34(b)(2)(a), which reduce the time periods for various activities to happen. In addition, Rule 34 has been revised in ways that encourage cooperation and reduce the opportunity for dilatory tactics:

Rule 34: Boilerplate objections are prohibited and objections must "state *with specificity* the grounds for objecting" and "whether any responsive materials are being withheld." The Committee notes: "An objection may state that a request is overbroad, but . . . should state the scope that is not overbroad." An objection that "states the limits that have

controlled the search for responsive and relevant materials"—which might include the date range or the scope of sources or search terms used—"qualifies as a statement that the materials have been 'withheld.'" Furthermore, this Rule includes a new provision that "[t]he production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." This new provision appears to limit the parties' ability to engage in unconstrained rolling productions. (*Id.*)

In terms of Rule 26(b)(1)'s focus on proportionality, the Advisory Committee on Rules of Civil Procedure noted that a party "may not refuse discovery simply by making a boilerplate objection that it is not proportional." (*Id.*) As part of the revisions to Rule 37(e) on sanctions, the Committee noted that the rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection." (*Id.*)

B. Using Rules of Professionalism and Civility to Maintain Cooperation

The Preamble to the Indiana Rules of Professional Responsibility includes some powerful statements about the role of the lawyer in the administration of justice and offers beautiful and compelling sentiments about the responsibilities that this entails, both within and outside the courtroom. Here are some examples:

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be an effective advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.

Many sections of the Indiana Rules of Professional Conduct help lawyers to aspire to the highest standards of professionalism in how they conduct themselves and how they treat other lawyers, judges, parties, witnesses and others who may be part of the judicial process. For example:

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

Rule 4.3. Dealing with Unrepresented Persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4. Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

In addition to what is provided in the Indiana Rules of Professional Conduct, a number of courts and bar associations have adopted statements on civility. (*See* Civility Principles, United States District Court, Eastern District of Michigan, December 3, 2007, <https://www.mied.uscourts.gov/PDFFiles/08-AO-009.pdf>, accessed 5/13/16.) For example, the Indianapolis Bar Association has Standards of Professionalism that are intended “[t]o foster respect and trust among lawyers and the public, to promote the fair and efficient resolution of disputes, to simplify transactions and to make the practice of law more enjoyable and satisfying.” (Standards of Professionalism, Indianapolis Bar Association, <https://www.indybar.org/index.cfm?pg=Professionalism-HomePage>, accessed 5/13/16.) The standards address commitment, character, competence, courtesy and community involvement. Standard IV. Courtesy states that “[w]e will at all times act with dignity, civility, decency and courtesy in all professional activities and will refrain from rude, disruptive, disrespectful, obstructive and abusive behavior.” (*Id.*) Many bar associations, including the Indianapolis Bar Association, have resource materials available to encourage professionalism and civility and many promote professionalism their members with awards for civility. For example, the Litigation Section of the Indiana State Bar Association is currently requesting nominations for its Civility Award, which recognizes an attorney and judge for outstanding civility and professionalism in their dealings with fellow judges, attorneys, parties, witnesses and the public. (<https://inbar.site-ym.com/page/civilityawards>, accessed 5/13/16.)

One thing that the author has observed over the years since she finished law school is a softening of the concept of “zealous advocacy.” In some situations, this phrase seemed to be an excuse for lack of civility, professionalism and decorum in the courtroom. However, this concept is still found in the Preamble to the ABA Model Rules of Professional Conduct:

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Similar language is also found in the Comment to Rule 1.3 Diligence:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

However, this concept is missing from the Indiana Rules of Professional Conduct. Interestingly, lack of cooperation and/or inaccurate representations is one of the checkboxes in the database of cases on electronic discovery provided by K&L Gates:

K&L GATES

www.ediscoverylaw.com

Electronic Discovery Case Database

K&L Gates maintains and continually updates a database containing more than 3,000 electronic discovery cases collected from state and federal jurisdictions around the United States. This database is searchable by keyword, as well as by any combination of 36 different case attributes, e.g., on-site inspection, allegations of spoliation, motion for a preservation order, etc. Each search will produce a list of relevant cases, including a brief description of the nature and disposition of each case, the electronic evidence involved and a link to a more detailed case summary if available. For an alphabetical list of all cases contained within the database, click the search button at the bottom of the page.

Please select one or more of the following case attributes and/or enter keyword search terms below:

E-Discovery Rules

<input type="checkbox"/> FRCP 26(b)(2)(B) "Not Reasonably Accessible"	<input type="checkbox"/> FRCP 34(b) Procedure or Format	<input type="checkbox"/> FRCP 26(b)(5)(B) or FRE 502
<input type="checkbox"/> FRCP 37(e) Safe Harbor (prior to Dec. 1, 2015)	<input type="checkbox"/> FRCP 26(b)(2)(C) Limitations	<input type="checkbox"/> Local Court Rule, Form or Guideline
<input type="checkbox"/> FRCP 26(b)(1) Scope in General (effective Dec. 1, 2015)	<input type="checkbox"/> FRCP 37(e) Preservation (effective Dec. 1, 2015)	
<input type="checkbox"/> FRCP 26(c) Protective Orders		

Contact

<input type="checkbox"/> TRD or Preliminary Injunction	<input type="checkbox"/> Motion for Preservation Order	<input type="checkbox"/> Early Conference or Discovery Plan
<input type="checkbox"/> Motion to Compel	<input type="checkbox"/> Motion for Protective Order	<input type="checkbox"/> Third-Party Discovery
<input type="checkbox"/> Motion for Sanctions		

Particular Issues

<input type="checkbox"/> Data Preservation	<input type="checkbox"/> Mirror Images	<input type="checkbox"/> Cost Shifting
<input type="checkbox"/> Records Retention Policy	<input type="checkbox"/> On-Site Inspection	<input type="checkbox"/> Spoliation
<input type="checkbox"/> Backup Media Recycling	<input type="checkbox"/> Keyword Searches	<input type="checkbox"/> Court-Appointed Expert
<input type="checkbox"/> Backup Tapes	<input type="checkbox"/> Format of Production	<input type="checkbox"/> Privilege or Work Product
<input type="checkbox"/> Deleted Data Recovery	<input type="checkbox"/> Metadata	<input checked="" type="checkbox"/> Lack of Cooperation or Inaccurate Representations
<input type="checkbox"/> Admissibility	<input type="checkbox"/> Adequacy of Search/Identification or Collection (added 03/13)	<input type="checkbox"/> Computer Assisted Review
<input type="checkbox"/> Taxable Costs	<input type="checkbox"/> Proportionality	

Enter keyword search terms:

Limit results to citations with case summaries only ☐

Search Reset

A quick search of this database yields a number of recent cases where cooperation – or lack of it – was a central issue in discovery disputes. These are costly issues which waste time, add to the expense of litigation and can result in sanctions against the client and the lawyer.

C. Confidentiality and Data Security

Technology has brought many improvements to the practice of law and is often considered by commentators to be the great equalizer in law practice because it allows solo practitioners and small firms to compete against larger firms and provides an opportunity to realize real efficiencies in the delivery of legal services. However, that same technology can pose substantial risks, particularly with respect to confidentiality. The author teaches a full-semester course on cyber-security, with special emphasis on security in law firms, as well as a full-semester course on electronic discovery, an important subset within legal technology that

presents a number of concerns with client confidentiality and the waiver of attorney-client and attorney work-product privilege. In thinking about data security in law firms, one of the first principles to keep in mind is embodied in Rule 1.1 Competence, particularly Comment 6 (Indiana Rules of Professional Conduct):

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Many commentators asserted that the phrase “and its practice” included the intentional, appropriate and careful use of technology. This view was manifested in the revisions to the ABA Model Rules of Professional Conduct as part of the Ethics 20/20 Project. For example, Comment 8 to ABA Model Rule 1.1 states that:

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Since one of the main risks of using technology is the threat to client confidentiality, it is worth reviewing the major rule and comments that relate to this. From the Indiana Rules of Professional Conduct, here is Rule 1.6(a) and Comments 16 and 17.

Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

However, Comments 18 and 19 to the ABA Model Rules of Professional Conduct, Rule 1.6

provide more detailed guidance.

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. _

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions.

Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

There are many excellent sources of information on how law firms can increase the security of their data, their systems and their operations, particularly sensitive information relating to clients. One place to start is the website for Sensei Enterprises, Inc. (Sensei Enterprises, Inc., <http://senseient.com/>, accessed 5/13/16.) Nelson (lawyer) and Simek (engineer) have been leaders in information security, electronic discovery and data forensics for many years. This company's website is a treasure trove of information, including articles, blogs, podcasts and YouTube videos. Lawyers are encouraged to register for the free article distribution service. Nelson and Simek, along with colleague David G. Ries, have published a number of excellent books, including *Locked Down: Practical Information Security for Lawyers*, 2nd ed. (American Bar Association, 2016, ISBN 978-1-63425-414-4). The author used the first edition of this book as one of her two textbooks in her course on cyber-security and is delighted that a new edition is available. Likewise from the ABA is *Information Security and Privacy: A Practical Guide for Global Executives, Lawyers and Technologists* by Thomas Shaw (American Bar Association, 2011, ISBN 978-1-61632-807-8), the other textbook used in the author's course. Communication with Mr. Shaw indicates that a new edition of his book is planned for release in 2016. In the meantime, the content of the 1st edition has been updated by articles in the *Information Law Journal*, which is a publication of the Information Security and EDDE Committees, ABA Section of Science & Technology Law.

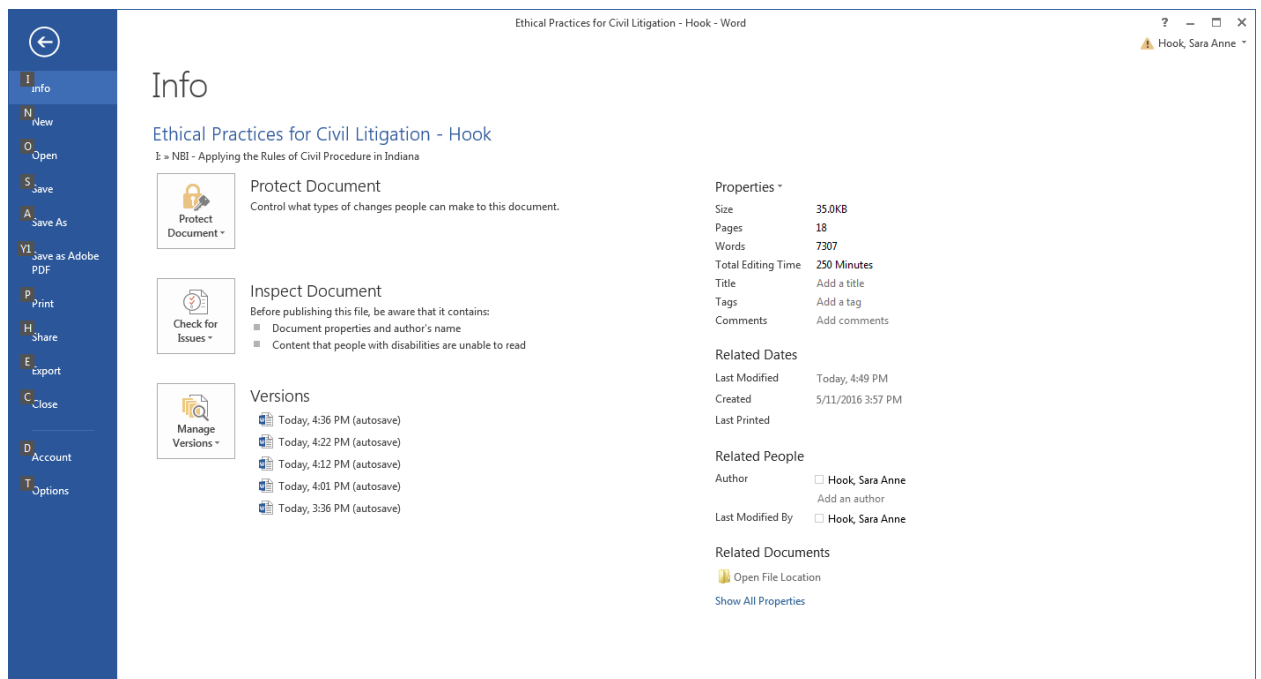
(<http://apps.americanbar.org/dch/committee.cfm?com=ST230002>, accessed 5/13/16.) As

reported in the May 2016 issue of ABA Journal, cyber-security was a major theme at the ABA Techshow 2016. (Victor Li, Private Lines: Cybersecurity Issues and Advice Steal the Techshow, *ABA Journal*, May 2016, p. 32.) It is interesting to track the increasing awareness of lawyers about the serious subject of cyber-security, as evidenced by the ABA's annual technology survey (*ABA Techreport 2015*, <http://www.americanbar.org/publications/techreport/2015.html>, accessed 5/13/16.) Among the topics that David Ries includes in his summary of the security portion of the report are statistics on security breaches by size of law firm, security programs and policies, cyber-insurance coverage, authentication and access control, encryption, basic security tools and disaster recovery/business continuity.

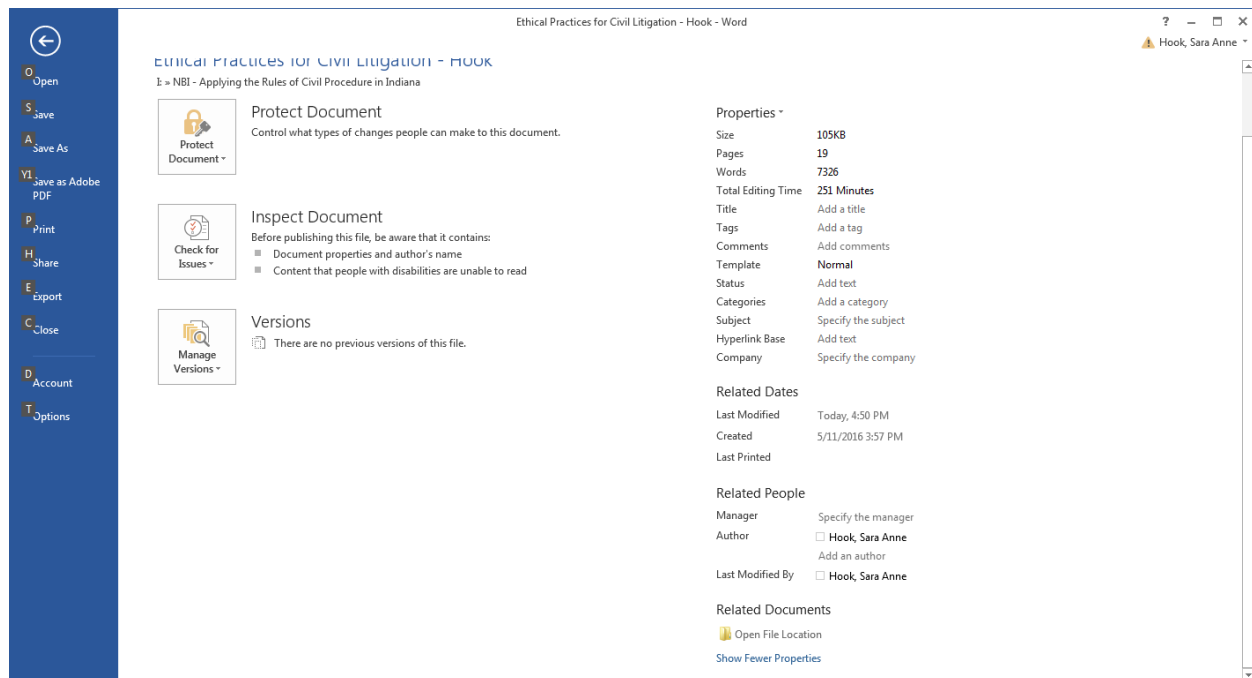
Another excellent source of information on confidentiality and data security is the International Legal Technology Association (ILTA), which law firms can join for very modest annual dues based on the size of the law firm (<http://www.iltanet.org/get-involved/membership>, accessed 5/13/2016.) ILTA publishes a quarterly journal, *Peer to Peer*, as well as White Papers, surveys, conferences, virtual events and local meetings. Many of the virtual events are free or very low cost. The author has used ILTA's webinars in her courses and there are also podcasts and recordings of various events. One of the communities within ILTA is LegalSEC, designed to cover cyber-security issues in law firms. (<http://connect.iltanet.org/resources/legalsec?ssopc=1>, accessed 5/13/16.)

One risk to confidentiality that lawyers do not necessarily think about is metadata. Defined as "data about data", most metadata is generated automatically by various software, including Word, without the user even being aware of it. Yet metadata can reveal information

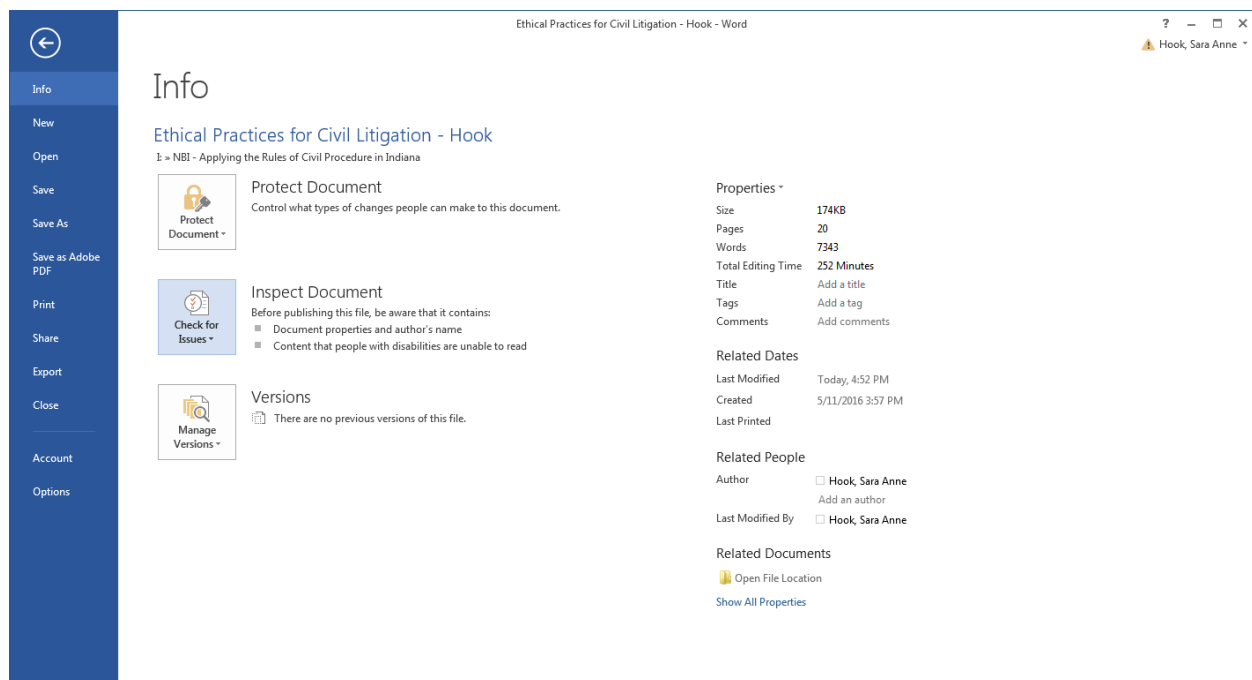
that would be damaging to a client or a case, including who authored and revised a document, the dates of creation and revision, etc. Some metadata can be revealed by easily-accessed features of the software itself. For example, this simple screen under Info in Word provides a wealth of information about my section of the seminar manual.



I can see additional information just by clicking Show All Properties at the bottom of the screen.



I can use the Inspect Document feature to check for issues with the document, such as for the document's properties and the author's name:



Prior to transmitting a document, its metadata should be removed via one of the prescribed methods. Although many people believe that converting the document to PDF format will be enough to remove metadata, others caution that this is not necessarily always effective. The ABA's website has a compilation of ethics opinions related to metadata the U.S. (Metadata Ethics Opinions Around the U.S.,

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/carts_fyis/metadachart.html, accessed 5/13/16.) Of course, if litigation can be reasonably anticipated, the lawyer and the client are under a duty to preserve any potentially relevant ESI (electronically stored information) in its native format with metadata intact.

One of the biggest risks to confidentiality and data security is social media. As indicated in the next section, the author has given presentations and published materials on the ethical issues with a lawyer's use of social media. The immediacy and informality of social media often means that people are not as circumspect about what they choose to post and share, which can result in revealing confidential client information. Moreover, most courts have said that what is posted on social media is nearly always discoverable and admissible. The law firm will want to have policies about the use of social media, not only for its lawyers, but also for its internal staff as well as any third-party contractors it might be using. First, the law firm will need an Acceptable Use Policy that covers all use of technology (social media, Internet, email, texting, telephone, photocopier, etc.) that includes the right to monitor. Second, the law firm will want to have ongoing training about the risks of social media, especial as it relates to client confidentiality. Third, if the law firm is going to be active in social media, it will need someone in charge of this process, standards and policies and a vetting of anything that is going to be posted. Fourth, the law firm will also need proper oversight of any third-party providers and

contract lawyers, with a contract or Service Level Agreement covering security, privacy, etc. Finally, it is important to note that the continued blurring of personal and professional lives through allowing personal devices (BYOD) only increases the risks.

The client's use of social media poses risks to confidentiality. One recommendation is to have a thorough conversation with the client about how he/she would like to be communicated with. This information should be included in the representation letter. This is an opportunity to alert the client to the risks of communicating through a public fax, an employer-provided email system, an email system where family members have access to each other's messages or share the same login and password or talking loudly in public on a cell phone, all of which can waive the attorney-client privilege. Social media is especially tempting for clients – it is so easy to post information about an opposing party (soon-to-be ex-spouse) or reveal information that would be adverse to a client's case (mountain climbing when claiming to be injured and unable to work). Social media provides a particularly rich repository of evidence in bankruptcy (*see* article by Hook and Taht). Lawyers do use social media extensively to find information about opposing parties, judges, witnesses, etc., so clients should be made aware of this. On the other hand, the client should be admonished not to alter, change or remove information from his/her social media site once litigation is reasonably anticipated, because doing so could bring a claim of spoliation. However, note that one of the major revisions to the Federal Rules of Civil Procedure was to Rule 37(e), which attempts to clarify when sanctions are available for spoliation.

D. Rules Against Ex Parte Communications

An ex parte communication occurs “when a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with the judge about the issues in the case without the other parties' knowledge.” (Why Can't I Talk or Write to the Judge?,

http://www.courts.state.hi.us/self-help/exparte/ex_parte_contact, accessed 5/11/16) The Indiana Rules of Professional Conduct provide excellent guidance and commentary on the ethical issues of ex parte communications.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment.
- (d) engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

In addition to looking at the Indiana Rules of Professional Conduct, lawyers who are going to be practicing in a particular court or jurisdiction should consult the local rules of that court for potential rules and restrictions on ex parte communications.

It is important to note that lawyers in Indiana do face disciplinary action for ex parte communications. For example, a lawyer in Tippecanoe County received a private reprimand after the Indiana Supreme Court determined that she had violated Rule 3.5(b) when an emergency petition for a temporary guardian appointment was presented to the judge before notice was presented to the parents. (Jennifer Nelson, Attorney Reprimanded for Ex Parte Communication, *The Indiana Lawyer*, October 15, 2015, <http://www.theindianalawyer.com/attorney-reprimanded-for-ex-parte-communication/PARAMS/article/38478>, accessed 5/13/16.) As reported in the article, “[t]he respondent did not provide advanced notice to the mother or putative father before presenting the petition to the judge, nor did she comply with Trial Rule 65(B), requiring her to certify to the court any efforts made to give notice to the adverse parties and the reasons supporting a claim that notice should not be required.” (*Id.*) In another example, the Indiana Supreme Court found that a lawyer had committed misconduct by engaging in an improper ex parte communication with a judge and in conduct prejudicial to the administration of justice. (Marcia Oddi, Ind. Decisions – Supreme Court Suspends an Attorney for Improper Ex Parte Communication with a Judge, *The Indiana Law Blog*, December 27, 2010, http://indianalawblog.com/archives/2010/12/ind_decisions_s_632.html, accessed 5/13/16.) For this conduct, the lawyer was suspended from the practice of law for 30 days with automatic reinstatement, concluding that she had violated both Rule 3.5(b) and Rule 8.4(d), with Justice Sullivan advocating for a harsher penalty. As the court noted, “[a]lthough Respondent was motivated by genuine concern for her client at a time of apparent crisis, we conclude that Respondent's disregard for the orderly administration of justice and the rights of opposing parties is serious enough to warrant a brief suspension from the practice of law in this state.” (*Id.*)

This author has published on and given presentations about the ethical issues with a lawyer's use of social media. Among the many risks of social media that have been identified are competence, diligence, supervision, confidentiality, privilege, attorney-client relationships, conflicts of interest, unauthorized practice of law (UPL), marketing/advertising, solicitation and honesty in communications (*see* Steven C. Bennett, Ethics of Lawyer Social Networking, 73 *Albany Law Review* 113 (2009).) However, Hoover has identified *ex parte* communications as being another risk posed by social media. (John David Hoover, Law Tips: Social Media & Legal Ethics – Part 1, ICLEF, August 7, 2012, <http://iclef.org/2012/08/law-tips-social-media-legal-ethics-part-1/>, accessed 5/13/16.) In terms of *ex parte* communications, the article considers the ethical breaches of both judges and lawyers by reporting on examples of this behavior in South Dakota and North Carolina:

Under Indiana's Code of Judicial Conduct, Canon 2, Rule 2.9, any *ex parte* communications of any kind between a judge and counsel must be avoided at all costs. This applies to social media, or otherwise. *See also*, Ind. R. Prof. Cond. 3.5. The South Dakota Supreme Court recently issued an opinion addressing the issue of allegedly *ex parte* communications with a judge on Facebook. In *Onnen v. Sioux Falls Independent School District #49-5*, 801 N.W.2d 752 (S.D. 2011), the plaintiff appealed a denial of his motion for a new trial based on the alleged bias of the presiding trial court judge. During the trial, one of the major witnesses posted a "happy birthday" message on the judge's Facebook "wall." The South Dakota Supreme Court affirmed the denial of a new trial, finding that the message was not, by definition, an *ex parte* communication, because it was not related to any court action. Rather, it was only incidental contact between the judge and a witness, and there was no indication that the message improperly influenced the judge in any way.

The North Carolina Judicial Standards Commission publicly reprimanded a judge for engaging in *ex parte* communications with a lawyer appearing before him in a child custody dispute. *See* North Carolina Judicial Standards Commission, Inquiry No. 08-234, Public Reprimand of B. Carlton Terry, Jr. The judge and attorney were Facebook "friends" with one another. During an in-chambers meeting, the judge and lawyers were reviewing testimony that suggested one of the parties was having an affair. One of the lawyers stated, "I will have to see if I can prove a negative." That night, the judge checked the lawyers Facebook account and saw where he had posted "how do I prove a negative?" The judge then posted to his account that he had "two good parents to choose from" but felt that "he will be back in court" referring to the case not being settled. The

lawyer then posted, “I have a wise judge.” The Commission concluded that these messages constituted *ex parte* communications with counsel for a party in a matter being tried before him, thereby violating several canons of the Code of Judicial Conduct. (*Id.*)

Hoover goes on to observe that:

Obviously, under Rule 3.5 of the Indiana Rules of Professional Conduct, the conclusion would be the same for this type of conduct as to the lawyer. The informal nature of social networking may lead a lawyer to engage in communications that he or she would never dream of doing face to face. The simple rule to follow with regards to *ex parte* communications is that, if you cannot do it in the real world, don’t do it in the virtual world. (*Id.*)

E. Identifying and Avoiding Conflicts of Interest

There are many rules that address conflicts of interest that are part of the Indiana Rules of Professional Conduct. Of course, the major rule is Rule 1.7 Conflict of Interest: Current Clients.

Rule 1.7. Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

In addition to restricting the circumstances under which a lawyer can represent more than one party and the requirements to proceed with such an arrangement, the comments to Rule 1.7 illuminate a number of additional situations which might inhibit a lawyer’s ability to thoroughly,

diligently and objectively represent a client. These situations include responsibilities to former clients and other third parties, conflicts because of personal interests and when the lawyer represents an organization.

Specific guidance about conflicts of interest between the client and the lawyer are covered under Rule 1.8. Conflict of Interest: Current Clients: Specific Rules. These include limitations on engaging in business transactions with the client, soliciting gifts from the client, negotiating media or literary rights, providing financial assistance to the client, accepting compensation for legal services from someone other than the client, participating in aggregated settlements or plea agreements, limiting the lawyer's liability for malpractice, acquiring a proprietary interest in a cause of action or engaging in a sexual relationship unless the relationship existed beforehand.

Additional rules cover more specific situations, including duties to former clients:

Rule 1.9. Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Perhaps one of the most significant elements of Rule 1.9 is what imputation of a conflict of interest to the lawyer as well as the law firm that he or she is part of. This is especially evident in a legal employment world where people no longer stay at the same law firm for their entire careers and where law firms merge, separate and even disband. Thus, it is worth reading the comments to Rule 1.9 regarding lawyers moving between firms carefully. The imputation of a conflict of interest is considered in more detail in Rule 1.10:

Rule 1.10. Imputation of Conflicts of Interest: General Rule

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9, or 2.2 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
 - (1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;
 - (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Another issue posed by an increasingly volatile legal employment marketplace are situations where a person transitions from being a public officer or employee in government service into private practice or has a concurrent appointment with a government agency. Rule

1.11 Special Conflicts of Interest for Former or Current Government Officers and Employees
provides guidance on these types of situations:

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in the firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) As used in this Rule, the term “matter” includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Other roles that may result in a conflict of interest are when a lawyer has previously served as judge, arbitrator, mediator or other third-party neutral, as explained in Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral:

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to any such person may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the law clerk's employer.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

One situation that has resulted in disciplinary action against lawyers in Indiana is when the lawyer “forgets” who his/her client is. The most common example of this type of situation is when the lawyer represents an organization (company) and also tries to – or is inveigled into – represent one of the owners or principals of that organization. Thus, there is considerable attention paid to this potential conflict of interest in Rule 1.13 Organization as Client and its Comments.

Rule 1.13. Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Other risks of ethical breaches by the lawyer because of a conflict of interest may stem from the lawyer's duties to prospective clients:

Rule 1.18. Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.